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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

JANET DENISE PHELPS, Plaintiff and Respondent, v. KENNETH MILTHORN MURRAY et al., Defendants and Appellants.	C040242 (Super. Ct. No. CV 97-595)

In this personal injury action arising from a vehicular collision, a jury found defendant Kenneth Milthorn Murray negligent in connection with injuries sustained by plaintiff Janet Denise Phelps and awarded her over $1.3 million in economic damages and $900,000 in noneconomic damages.[1]

Defendant's appeal focuses primarily on his unsuccessful effort to bar plaintiff from recovering noneconomic damages

[1] The judgment was also against California Movers Express, but since the arguments on appeal solely address defendant Kenneth Milthorn Murray, this opinion refers to Mr. Murray as the "defendant."

pursuant to Civil Code section 3333.4 on the ground that she was uninsured at the time of the accident.[2] Specifically, defendant contends that the trial court erred in finding that he waived his right to a jury trial on the issue whether plaintiff was uninsured, that the court abused its discretion in refusing to grant him relief from his purported waiver of his right to a jury trial on that issue, and that it "erred in ruling that the [court clerk's] dismissal of plaintiff's citation for failing to provide evidence of insurance . . . conclusively established that her vehicle was insured."

Defendant also contends (1) that the trial court erred by permitting the jury to determine noneconomic damages by applying a "multiplier"; (2) that the trial court erred in "applying the collateral source rule to exclude evidence of plaintiff's prior workers' compensation claim alleging that she had quit her job for reasons unrelated to the automobile accident"; and (3) that

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[2] In relevant part, Civil Code section 3333.4 provides:

(a) Except as provided in subdivision (c), in any action to recover damages arising out of the operation or use of a motor vehicle, a person shall not recover non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages if any of the following applies: [¶] . . . [¶] (2) The injured person was the owner of a vehicle involved in the accident and the vehicle was not insured as required by the financial responsibility laws of this state. [¶] (3) The injured person was the operator of a vehicle involved in the accident and the operator can not establish his or her financial responsibility as required by the financial responsibility laws of this state."

plaintiff provided insufficient evidence to show that her medical bills represented the reasonable value of the services rendered and that they were all attributable to her accident.

Because none of defendant's claims can serve to reverse the judgment, we shall affirm.

FACTUAL BACKGROUND

We recite here those facts common to defendant's various contentions on appeal and shall cite additional facts as they become relevant during our discussion of each particular issue.

This case arises from an April 18, 1996 vehicular collision on Interstate 80 near Davis involving a pickup truck owned and driven by plaintiff Phelps, a tractor-trailer driven by defendant Murray, and a sedan driven by Paul B. Lim.[3]

At the scene of the accident, plaintiff received a citation for failure to provide proof of insurance in violation of Vehicle Code section 16025, subdivision (a), which requires every driver involved in an accident, unless rendered incapable, to exchange with every other driver "[e]vidence of financial responsibility." (Veh. Code, § 16025, subd. (a)(2).[4])

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[3] Lim, who was also a defendant in this action until trial, was granted a nonsuit and is not a party to this appeal.

[4] In full, Vehicle Code section 16025 states:

"(a) Every driver involved in the accident shall, unless rendered incapable, exchange with any other driver or property owner involved in the accident and present at the scene, all of the following information:

(CONTINUED.)

Under Vehicle Code section 16025, if evidence of financial responsibility is in the form of a policy of liability insurance, the driver must supply "the name and address of the insurance company and the number of the insurance policy." (Veh. Code, § 16025, subd. (a)(2); see also Veh. Code, § 16020, subds. (a), (b).) A driver who fails to do so is "guilty of an infraction punishable by a fine not to exceed two hundred fifty dollars ($250)." (Veh. Code, § 16025, subd. (b).)

Two weeks after the accident, plaintiff contacted the Yolo County court clerk's office about her citation. According to the court's computer register of actions, the following entry for May 2, 1996, was made by Dian Stanfill, then traffic division supervisor for the Yolo County courts: "Def phoned. Was quoted $20 for her ticket. (She has proof of insurance that was in effect on date of violation) -- Per M. Lane -- if Def

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"(1) Driver's name and current residence address, driver's license number, vehicle identification number, and current residence address of registered owner.

"(2) Evidence of financial responsibility, as specified in Section 16020. If the financial responsibility of a person is a form of insurance, then that person shall supply the name and address of the insurance company and the number of the insurance policy.

"(b) Any person failing to comply with all of the requirements of this section is guilty of an infraction punishable by a fine not to exceed two hundred fifty dollars ($250)."

shows proof -- ok to dismiss. //D.S."[5] Plaintiff's citation was subsequently dismissed with plaintiff's payment of a $20 fee.[6]

Plaintiff then filed this action, alleging negligence and seeking special damages for medical expenses, wage loss, and general (noneconomic) damages for her injuries.

As an affirmative defense, defendant alleged plaintiff was uninsured at the time of the accident, and as a result, barred from recovering noneconomic damages pursuant to Civil Code section 3333.4.

Before trial, then-defendant Lim sought summary adjudication of that affirmative defense: He argued that there was no triable issue of fact as to whether plaintiff was insured within the meaning of Civil Code section 3333.4, because

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[5] Based on the computer entry, it appears that Ms. Stanfill mistakenly believed that plaintiff had been cited for failing to comply with a different statute -- Vehicle Code section 16028 -- which requires a driver involved in an accident to "furnish written evidence of financial responsibility upon the request of the peace officer" (Veh. Code, § 16028, subd. (c).) Unlike Vehicle Code section 16025, section 16028 allows (but does not require) the officer to issue a citation for its violation, and further provides that a citation so issued may be dismissed if the driver thereafter provides written evidence to the clerk of the court that he or she was in compliance with the financial responsibility laws at the time of the accident. (Veh. Code, § 16028, subd. (e).)

[6] The court's computer register of actions shows the following entries on May 24: "Proof of Corrections Sub . . . [¶] . . . Sent: Fix-it ticket fee[,] Count 1-1 ($10.00) . . . [¶] . . . Sent: Record-keep fee $1[,] Count 1-1 ($10.00) . . . [¶] . . . Min: Case Dismissed. . . ."

plaintiff had failed to produce during discovery any documentary evidence that she personally carried insurance on her truck at the time of the accident, notwithstanding her deposition testimony that she had purchased a policy of insurance (the name of which she could not recall) which was in effect at the time of the accident.

In opposition to the motion, plaintiff argued that she was not uninsured for purposes of Civil Code section 3333.4 because she had successfully obtained a dismissal of the citation issued for her failure to have proof of insurance, which dismissal necessarily required proof of insurance to the court's satisfaction. Alternatively, plaintiff argued that the requirements of Civil Code section 3333.4 were satisfied by her employer's insurance policy because she was running an errand for her employer at the time of the accident, and thus was covered by her employer's insurance policy when the accident occurred.[7]

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[7] Plaintiff submitted a declaration in opposition to the motion, in which she averred that about six months before the accident, she had purchased a policy of liability insurance for the pick-up truck that she had been driving at the time of the accident. However, she also averred that she had paid cash for the policy, had no documentation evidencing the insurance policy, could not recall the name of the independent insurance agent from whom she had purchased the policy, and could not recall the name of the insurance company that had issued the policy. Moreover, plaintiff averred that she had sent the original policy documentation to the county court with a fee in order to secure the dismissal of her citation, but that the court had no longer retained the policy that she had provided.

(CONTINUED.)

The motion was denied.[8]

And in an in limine proceeding conducted by the trial court during a break in jury selection, the court determined that plaintiff, in fact, had insurance at the time of the accident, thereby eliminating defendant's affirmative defense to plaintiff's noneconomic damage claim.

Thereafter, the jury found defendant negligent, and awarded plaintiff $313,423 in past medical expenses, $175,249 in future medical expenses, $847,270 in past and future lost income, and $900,000 in past and future noneconomic damages.[9]

DISCUSSION

I.

Defendant Waived His Right to Jury Trial on the Application of Civil Code Section 3333.4

Civil Code section 3333.4 bars the recovery of noneconomic losses "[i]n any action to recover damages arising out of the operation or use of a motor vehicle," where the injured person at the time of the accident was either the owner of an uninsured

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She also submitted the declaration of Dian Stanfill, a county traffic court clerk, who averred that "the citation issued to Ms. Phelps would not have been dismissed unless she had presented proof of an insurance policy that was in effect as of the date of the violation, April 18, 1996."

[8] The record with which we have been provided does not state the trial court's basis for its ruling denying the summary adjudication motion.

[9] These awards are rounded to the nearest dollar.

vehicle involved in the accident or a vehicle operator unable to establish his or her financial responsibility. (Civ. Code, § 3333.4, subds. (a)(2), (3); see *Allen v. Sully-Miller Contracting Co.* (2002) 28 Cal.4th 222, 230.)

Whether a plaintiff is precluded by Civil Code section 3333.4 from recovering noneconomic damages is usually determined in limine by the trial court. (E.g., *Allen v. Sully-Miller Contracting Co., supra,* 28 Cal.4th at p. 226; *Savnik v. Hall* (1999) 74 Cal.App.4th 733, 736; *Goodson v. Perfect Fit Enterprises, Inc.* (1998) 67 Cal.App.4th 508, 511; *Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 978.)

Here, in the course of ruling on the parties' respective motions concerning the applicability of Civil Code section 3333.4, the trial court made a factual finding that plaintiff was insured at the time of the accident and that the statute therefore did not operate to preclude plaintiff's introduction of evidence of noneconomic damages.

On appeal, defendant contends that the trial court erred in making this factual finding, because he did not waive his right to a jury trial on that issue. He reasons that the trial court erred because it "found that the waiver had been made by 'conduct,' consisting of defense counsel's silence when counsel for plaintiff proposed that the court make an initial ruling on its legal theory concerning plaintiff's insurance coverage." He claims that there can be no waiver by implication.

We conclude that defendant effectively waived his right to a jury trial on the issue of whether plaintiff was uninsured at the time of the accident.

A. Legal Background

A civil litigant has "an inviolate right" to a jury trial, secured by the California Constitution. (Cal. Const., art. I, § 16.) That right "'should be zealously guarded by the courts [citation]. In case of doubt therefore, the issue should be resolved in favor of preserving a litigant's right to trial by jury. [Citations.]'" (*Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 862-863; *Byram v. Superior Court* (1977) 74 Cal.App.3d 648, 654.)

But "[i]n a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute." (Cal. Const., art. I, § 16.)

Code of Civil Procedure section 631 is the statute that prescribes the form of consent for waiver of trial by jury. At all relevant times herein, that section provided as follows:

"(a) Trial by jury may be waived by the several parties to an issue of fact in any of the following ways:

"(1) By failing to appear at the trial.

"(2) By written consent filed with the clerk or judge.

"(3) By oral consent, in open court, entered in the minutes or docket.

"(4) By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation.

"(5) By failing to deposit with the clerk, or judge, advance jury fees 25 days prior to the date set for trial, except in unlawful detainer actions where the fees shall be deposited at least five days prior to the date set for trial, or as provided by subdivision (b). An advance jury fee deposited pursuant to this paragraph may not exceed a total of one hundred fifty dollars ($150).

"(6) By failing to deposit with the clerk or judge, promptly after the impanelment of the jury, a sum equal to the mileage or transportation (if any be allowed by law) of the jury accrued up to that time.

"(7) By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day's session a sum equal to one day's fees of the jury, and the mileage or transportation, if any." (Stats. 2000, ch. 127, § 2.)

If a party states in a document filed with the court that he intends to try a matter to the court, rather than to a jury, he is considered to have made an express waiver of a jury trial within the meaning of the statute's requirement of "written consent filed with the clerk or judge." (Code Civ. Proc., § 631, subd. (a)(2); see, e.g., *Hayden v. Friedman* (1961) 190 Cal.App.2d 409, 410-411 [answering "'No'" in the at-issue

memorandum to the question whether a jury was demanded constituted an express consent to waive a jury trial within meaning of the statute]; *March v. Pettis* (1977) 66 Cal.App.3d 473, 477 [same]; *Bishop v. Anderson* (1980) 101 Cal.App.3d 821, 823 [same]; *Simmons v. Prudential Ins. Co*. (1981) 123 Cal.App.3d 833, 836 [negative response to whether a jury trial is demanded in the trial setting conference statement constitutes an express waiver of the right to a jury trial under the statute].)

Applying these principles here compels the conclusion that defendant made an express waiver of a jury trial on his Civil Code section 3333.4 defense to noneconomic damages by virtue of the filing of his trial brief, which asked *the court* to rule that "plaintiff has not and cannot demonstrate financial responsibility as required by the laws of the State of California at the time of the accident." As demonstrated herein, by asking, without qualification, that the trial court decide that "plaintiff has not and cannot demonstrate financial responsibility," defendant necessarily yielded to the trial court the power to decide, to the contrary, that plaintiff had demonstrated financial responsibility.

B. The Trial Briefs

Both plaintiff and defendant filed trial briefs asking that the trial court make a threshold determination as to the applicability of Civil Code section 3333.4.

In the "Summary of Argument" section of his trial brief, defendant made the following argument:

"*The issue presented by the instant brief involves the application of Civil Code section 3333.4, which defendants contend operates as a complete bar to plaintiff's claim for noneconomic damages.* [¶] Throughout this litigation, plaintiff has tried to avoid application of Proposition 213 [which enacted Civil Code section 3333.4]. At various times, plaintiff has argued that at the time of the accident, she was covered under her employer's business liability policy. This coverage issue is a pure question of law for the court. [¶] Ms. Phelps has also claimed her own automobile liability insurance coverage was in force at the time of the accident. However, plaintiff has never been able to find her policy or present any proof of insurance. [Fn. omitted.] Plaintiff can't remember the name of her insurance company or the name of her agent. Plaintiff has no canceled check or other documentary evidence such as a notice of renewal or notice of cancellation which would support her position that she had her own automobile liability insurance coverage at the time of the accident. Nonetheless, Ms. Phelps has somehow managed to avoid summary adjudication of her general damages claim to this point, apparently because the court felt the above summary of evidence raises triable issues of fact. *The time has come to finally present this issue to the finder of fact.* [¶] Below, defendants briefly discuss Civil Code section 3333.4 and the application of the statute's plain language to the facts of this case. Then, defendants explain why plaintiff's employer[']s business liability policy does not afford plaintiff coverage in the instant case. Again, this

latter issue presents a pure question of law to be decided by the court. [¶] *Then, defendants preview plaintiff's anticipated trial testimony and explain why even her own version of events, if believed, establish that plaintiff cannot demonstrate financial responsibility as required by the laws of the State of California.* Defendants contend that even assuming plaintiff's 'my policy blew out the window' story is believed by the jury, she is out of luck as to her claim for general damages. *This issue also presents a pure question of law to be decided by the court.*" (Italics added.)

Following the body of his brief, which addressed itself chiefly to the argument that plaintiff was not an insured under her employer's policy, defendant concluded:

"The instant case presents several legal issues for the court's consideration. Based on the above discussion, *defendants respectfully request that the court determine Ms. Phelps has no coverage under her employer's business liability policy. Second, defendants respectfully request that the court rule that plaintiff has not and cannot demonstrate financial responsibility as required by the laws of the State of California at the time of the accident.* [¶] The legal effect of ruling as requested above is that Civil Code section 3333.4 operates as a complete bar to plaintiff's claim for noneconomic damages. [¶] *For all of these reasons, the court should conclude that Civil Code section 3333.4 bars Ms. Phelps from*

recovering noneconomic damages in this case as a matter of law." (Italics added.)

Plaintiff's trial brief likewise asked the trial court to determine the applicability of Civil Code section 3333.4 and expressly asked the court to decide the necessary factual issues: She requested an "in limine hearing and ruling from this Court confirming that Proposition 213 [which enacted Civil Code section 3333.4] does not apply." Plaintiff argued that the nonapplicability of Civil Code section 3333.4 "must be decided by the Court, and not the jury" because the issue poses "a technical legal defense, and there are no jury questions to decide. To the extent there are factual matters . . . , they are factual matters that may be handled by the Court. In this case particularly, it would be inappropriate to have the jury deciding the Proposition 213 issue, since a large part of Plaintiff's position requires a knowledge and understanding of how this Court's Clerk's office handles these matters." Moreover, plaintiff asserted that juror consideration of the issue "would be inappropriate because of the necessary focus on insurance" and would "invite[] the jury to speculate on the nature and extent of insurance available to all parties." On the merits, plaintiff's brief argued at length that she was not uninsured within the meaning of Civil Code section 3333.4.

Accordingly, defendant's and plaintiff's trial briefs both asked the court, not a jury, to decide the applicability of Civil Code section 3333.4 in their favor. This would appear to

constitute the "written consent filed with the clerk or judge" required by Code of Civil Procedure section 631. Defendant now argues that his apparent written consent did not submit to the court the right to make findings of fact, only conclusions of law, but his conduct at the ensuing hearing belies this overly narrow interpretation.

C. The Hearings

On the day the parties filed their respective trial briefs, the court conducted a hearing on the matter.

As a threshold offer of proof, plaintiff submitted the declaration that she had previously filed in opposition to defendant Lim's summary adjudication motion, in which she had averred that she had purchased an insurance policy for her truck that was in effect at the time of the accident, had paid cash for the policy but had no documentary evidence of it, could not recall the name of the independent insurance agent from whom she had purchased the policy, and could not recall the name of the insurance company that had issued the policy.

Defendant cross-examined plaintiff concerning her purchase of the policy, her failure to produce evidence of insurance at the scene, her alleged submission of evidence of insurance to the traffic court, her belief before the accident that she would be covered by her employer's policy if she were involved in an accident while on an errand for her employer, and her subsequent assertion that she was, in fact, on an errand for her employer at the time of the accident. Defense counsel also cross-

examined plaintiff on other matters relevant to the trial court's assessment of "the credibility of Ms. Phelps" on the theory that the court should disbelieve plaintiff's testimony that she was on an errand for her employer at the time of the accident.

Defense counsel next cross-examined the traffic court clerk, Dian Smith (nee Stanfill), who spoke with the plaintiff on the telephone in May 1996 about her then-pending citation for her failure to produce evidence of financial responsibility. Smith testified that the citation issued to plaintiff would not have been dismissed unless plaintiff had presented a policy of insurance to the clerk that was in force on the day of the accident and covered plaintiff's truck.

Excerpts from the deposition of plaintiff's employer, in which he testified that plaintiff was on a work-related errand at the time of the accident, were also read into the record.

Following argument by the parties, the trial court ruled that because it had "significant doubt" that plaintiff was covered by her employer's insurance at the time of the accident, its determination of the issue under Civil Code section 3333.4 would "rise or fall on whether this Court believes she had her own personal insurance. [¶] The bottom line is that I do believe that she had her own personal insurance in effect at the time of the accident. And that's based on her testimony on the offer of proof. She may not be the best or smartest person when it comes to these kinds of decisions. After all, who pays cash

for these kinds of things? She had a valid explanation for doing that. [¶] Perhaps she could have gotten a bank check, if not a personal check. Perhaps the company could have verified it. But maybe they didn't want to or wouldn't want to. [¶] The fact is, I believe she did have insurance. That she did pay cash for it. It's borne out by the declaration, and by Ms. Smith's decision that she was entitled to the dismissal based on, or/and this fix-it ticket type dismissal, based on proof that was submitted. . . . [¶] So I do believe she had insurance. And therefore, that she would be entitled to -- based on proof, for noneconomic damages."

However, immediately after the trial court announced its ruling, defendant objected to the court's making of factual findings. Defendant asserted that "there would be ways for the Court to rule on this as a matter of law. . . . [¶] You could rule as a matter of law that she's out. But I think to say that she's in. And to say 'well, her story is believable enough,' that gets into [a] question of fact. And that's got to go to the jury. [¶] What I think, what we have got to do, is let Ms. Phelps tell her story about the cash payment to the agent, as to that part, assuming that the employer's policy is ruled out as a matter of law. We have got to find out if they believe it. Because this was not submitted to the Court for a factual determination on that part."

Plaintiff replied that the parties had expressly agreed to allow the court to determine whether she had insurance at the time of the accident.

The court responded to this exchange by reiterating its ruling: "I am making the decision as a matter of law that [plaintiff] did not have coverage under her employer's policy. [¶] I'm making the decision as a matter of fact, and as a matter of law that she did have coverage under her own personal policy. That's the end of that as far as I can say."

During a break from jury selection the following day, defendant asked the court for the reasons for its ruling that as a matter of fact and law, plaintiff could recover noneconomic damages. The trial court declined, characterizing the question as an untimely request for a statement of decision. Defendant again stated that he "didn't know that [he] had requested a Court trial."

Approximately one week later, after jury selection and opening statements, defendant filed a written motion seeking "relief from purported waiver of trial by jury." In the motion, he argued that although all parties agreed that the court should "determine whether, as a matter of law, the Plaintiff's employer's policy afforded her coverage and, secondly, assuming that Plaintiff had been cited for failure to produce proof of insurance . . . and later somehow managed to clear the citation against her, whether this was sufficient as a matter of law to allow her to claim noneconomic damages and present such evidence

before the jury," he had never waived jury trial as to any disputed factual issue. Rather, he argued that he had intended only "that the trial court decide whether, as a matter of law, Plaintiff's own version of events was sufficient to meet her burden of proof at trial in claiming noneconomic damages."

The trial court ultimately disagreed, finding that defendant had waived his right to a jury trial on the issue of whether plaintiff was barred from claiming noneconomic damages under Civil Code section 3333.4.

D. Analysis

On appeal, defendant contends that the trial court erred in ruling that he waived his right to trial by jury on the applicability of Civil Code section 3333.4. He argues that "the court found that the waiver had been made by 'conduct,' consisting of defense counsel's silence when counsel for plaintiff proposed that the court make an initial ruling on its legal theory concerning plaintiff's insurance coverage," but that there can be no waiver by implication.

However, although there can be no waiver by implication (*Cohill v. Nationwide Auto Service* (1993) 16 Cal.App.4th 696, 700), defendant's waiver was not by mere conduct or implication, but in accord with one of the methods provided by Code of Civil Procedure section 631: written consent filed with the clerk or judge in the form of a request in his trial brief that the court determine the matter. The only issue here is the scope of that waiver. Notwithstanding defendant's characterization of the

submitted issue as a "pure question of law to be decided by the court," he failed to qualify or limit the issue that he wanted the trial court, not a jury, to decide. Instead, his trial brief asked the trial court to decide that "plaintiff has not and cannot demonstrate financial responsibility." In so doing, defendant made an express waiver of his right to a jury trial on the issue of plaintiff's financial responsibility within the meaning of Code of Civil Procedure section 631. (See *Simmons v. Prudential Ins. Co.*, *supra*, 123 Cal.App.3d at p. 836.)

Defendant's post hoc insistence that he intended the trial court to make no findings of fact in deciding this issue is belied by his efforts to prove to the trial court, as a factual matter, that plaintiff was not covered by her employer's insurance policy because she was not acting in the course and scope of her employment at the time of the accident. Whether plaintiff was, in fact, running an errand for her employer at the time of the accident -- and thus acting within the course and scope of her employment -- posed a factual issue. Had the trial court been asked only to interpret the employer's policy, that would arguably have posed only a question of law. But defendant proceeded to cross-examine plaintiff at length on the scope of her general job duties and on the details of her alleged errand on the day of the accident. Regardless of his unstated intentions at the time he filed his brief, defendant's actions at the hearing were consistent only with a desire to

have the court, not the jury, determine whether plaintiff was covered by insurance at the time of the accident.

Additionally, had defendant wanted the trial court to determine only the legal sufficiency of plaintiff's evidence of insurance -- as he now suggests -- he would not have attempted to undermine plaintiff's credibility at the hearing for purposes of the trial court's assessment of her veracity. To the contrary, the time and effort defendant devoted to impugning plaintiff's testimony only makes sense if defendant was authorizing the trial court to make a factual determination over whether plaintiff had demonstrated financial responsibility, i.e., whether plaintiff proved that she had insurance at the time of the accident.

Accordingly, defendant's seemingly unqualified written consent to a court trial on the issue of plaintiff's financial responsibility was confirmed by his conduct at the hearing. And as with any writing, "[a]cts of the parties, subsequent to the execution . . . and before any controversy has arisen as to its effect, may be looked to in determining the meaning." (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 689, p. 622.) The trial court need not have read defendant's consent to a court trial in an overly literal and narrow fashion that was inconsistent with defendant's subsequent conduct at the hearing. Otherwise, ambiguously written consents to a jury waiver would be a trap for the unwary judge who considers writings at face value.

Defendant also argues that plaintiff only asked the trial court to find that plaintiff was adequately insured as a matter of law based on the dismissal of her citation and that she, too, did not submit factual issues for the trial court's determination. But this ignores plaintiff's trial brief, which states: "Because of the importance of this issue to the case (i.e., whether or not Plaintiff may put on evidence of and/or recover non-economic damages), and further because of the potential for prejudice to all parties from an extensive discussion of insurance issues in front of the jury, Plaintiff seeks an in limine hearing and ruling from this Court confirming that Proposition 213 does not apply." Plaintiff's brief also asserted that "[t]o the extent there are factual matters . . . , they are factual matters that may be handled by the court." Defendant's participation in the cross-examination of factual issues at the hearing, his own trial brief's seeming submission of the issue of financial responsibility to the court, and the plaintiff's express submission of factual issues to the court support the court's reading of the parties' trial briefs as a written consent to waiver of a jury trial on the issue.

Defendant also attacks the trial court's determination that he waived his right to a jury trial by arguing that "[t]he court decided the waiver issue under the wrong legal standard" because "the primary reason for finding a waiver was the 'enormous' prejudice which would allegedly be suffered by plaintiff if the insurance issue were tendered to a jury." But the trial court's

remark concerning the prejudice to plaintiff if it found no waiver was in the context of defendant's *motion for relief* from his jury waiver and in the context of the court's observation that its decision on the waiver issue was "a lose[-]lose situation." Those comments did not constitute the court's basis for originally concluding that the parties had consented to a court trial on the financial responsibility issue. Moreover, ultimately, in response to defendant's motion for relief from the jury waiver, the court concluded that its "original ruling stands" and did not specify any reasons.

Accordingly, defendant has no basis for claiming that the trial court decided that he had waived a jury pursuant to an incorrect standard. Instead, the trial court clearly based its original determination that defendant had waived a jury on the parties' written trial briefs and their subsequent conduct at the hearing. A reasonable review of the parties' briefs and their subsequent conduct would lead to the conclusion that the parties had, in fact, waived a jury on the issue of plaintiff's financial responsibility.

E. Defendant Failed to Preserve Any Objection to the Court Trial of Plaintiff's Financial Responsibility

Even if defendant's written waiver was not deemed unequivocal, defendant has not preserved his claim that he did not waive his right to a jury trial on the issue of financial responsibility because he only raised his objection *after* he seemingly gave his written consent to a court trial of the issue, *after* he failed to qualify the scope of that consent in

the face of plaintiff's clear submission of the issue for a court trial, *after* he participated in the court's fact-finding hearing, and *after* the court decided that issue. (See, e.g., *Taylor v. Union Pac. R.R. Corp.* (1976) 16 Cal.3d 893, 896, 899-901; *Tyler v. Norton* (1973) 34 Cal.App.3d 717, 722 ["After proceeding, without objection, to try their case for two days before a judge, [defendants] may not, after losing, raise the procedural issue" that they were wrongly denied a jury trial]; see also *Escamilla v. California Ins. Guarantee Assn.* (1983) 150 Cal.App.3d 53, 58-60; 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 113, pp. 131-132.)

Witkin explains: "No waiver results from going to trial after the erroneous denial of a jury, if the party makes a proper objection. [Citations.] But if a demand or motion for jury trial is denied by order, and the party goes to trial without renewing the motion or otherwise objecting to the denial of a jury, he cannot, on appeal, have the error reviewed." (7 Witkin, Cal. Procedure, *supra,* Trial, § 113, pp. 131-132.)

And as our Supreme Court reasoned in *Taylor v. Union Pac. R.R. Corp.*, *supra*, 16 Cal.3d 893, in which the plaintiff expressly waived a jury trial, failed to seek relief from that waiver before trial, and then sought to argue on appeal that he had wrongfully been denied a jury trial: "A party must preserve his record. Thus, it is well established that ' . . . a party cannot without objection try his case before a court without a jury, lose it and then complain that it was not tried by jury.

[Citation.]' [Citations.] As stated in the recent *Tyler* [*v. Norton, supra,* 34 Cal.App.3d 717, 722] case, wherein defendants proceeded to try the case before a judge without objecting to the absence of a jury, 'Defendants cannot play "Heads I win. Tails you lose" with the trial court.' [Citation.] [¶] Our review of the record indicates that plaintiffs' counsel, while carefully inquiring regarding the trial court's position on the waiver question, neither himself demanded a jury trial nor objected to the court's ruling. Under such circumstances, plaintiffs cannot now be heard to complain of that ruling." (16 Cal.3d at pp. 900-901; see also *Escamilla v. California Ins. Guarantee Assn., supra,* 150 Cal.App.3d at pp. 62-63.)

In this case, the defendant's failure to object to the absence of a jury trial throughout the hearing, making his first objection only after the trial court rendered its decision, constituted a failure to preserve his objection to the court trial on the financial responsibility issue. A party cannot expend the judiciary's and other parties' resources on a court trial without objection, only to object when the result is unfavorable. To argue otherwise would turn trials into trial runs and make trial errors the ultimate trial insurance.

This case is distinguishable from *Old Republic Ins. Co. v. FSR Brokerage, Inc.* (2000) 80 Cal.App.4th 666, where "Old Republic obtained clarification that the trial court would *not* determine [a particular issue], promptly objected when the trial court began to hear evidence on the issue, and expressly

demanded a jury trial when the trial court indicated it contemplated ruling on the matter." (*Id.* at p. 679.)

Accordingly, defendant failed to preserve his objection to the court trial on the financial responsibility issue by not objecting until after the trial court rendered its decision. In any event, the trial court did not err in determining that the defendant had waived his right to a jury trial on this issue by virtue of the parties' written briefs, which could be reasonably construed to submit the issue to the court, particularly in light of the parties' subsequent conduct.

II.

The Trial Court Did Not Abuse Its Discretion in Denying Defendant Relief From His Waiver of a Jury Trial

Defendant next contends that "[t]he trial court committed reversible error when it denied [his] motion for relief from waiver of trial by jury" in connection with the court's determination of plaintiff's financial responsibility pursuant to Civil Code section 3333.4.

Code of Civil Procedure former section 631, subdivision (d) -- which was in effect at the time of trial -- provides that the trial court may "in its discretion upon just terms, allow a trial by jury although there may have been a wavier of a trial by jury."[10]

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[10] This provision is now found in subdivision (e) of Code of Civil Procedure section 631. (Stats. 2002, ch. 806, § 15.)

"'It has been a general rule in California that once a party has waived his right to a jury trial[,] waiver cannot thereafter be withdrawn except in the discretion of the trial court.' [Citations.] Because the matter is one addressed to the discretion of the trial court, that court's denial of a request for relief of jury waiver cannot be reversed in the absence of proof of abuse of discretion. [Citations.] As with all actions by a trial court within the exercise of its discretion, as long as there exists 'a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be here set aside, even if, as a question of first impression, we might feel inclined to take a different view from that of the court below as to the propriety of its action.' [Citation.]" (*Gonzales v. Nork* (1978) 20 Cal.3d 500, 506-507.)

"In exercising its discretion, a trial court may consider diverse factors: '[D]elay in rescheduling the trial for jury, lack of funds, timeliness of the request and prejudice to all the litigants.' [Citations.] The court may also consider, 'prejudice to . . . the court, or its calendar' [citation], the reason for the demand, i.e., whether it is merely a 'pretext to obtain continuances and thus trifle with justice' [citation], whether the parties seeking the jury trial will be prejudiced by the court's denial of relief [citation] and whether the other parties to the action desire a jury trial." (*Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1176; *Bishop v. Anderson*, *supra*,

101 Cal.App.3d at p. 824; *March v. Pettis*, *supra*, 66 Cal.App.3d at p. 480.)

Moreover, some courts have emphasized that substantial prejudice to the opposing party, standing alone, constitutes a sufficient basis to deny a request for relief from waiver. (*Day v. Rosenthal*, *supra*, 170 Cal.App.3d at p. 1177; *Bishop v. Anderson*, *supra*, 101 Cal.App.3d at p. 824.)

In this case, after jury selection and opening statements, defendant filed a motion seeking relief from any purported waiver of the right to a jury trial.

At the hearing on defendant's motion, plaintiff argued that the timing of the motion prejudiced her: Because the trial court had ruled Civil Code section 3333.4 inapplicable, plaintiff claimed that she had not taken an opportunity during the remainder of voir dire to question jurors about their opinions concerning matters of insurance and insurance coverage, that her opening statement had omitted any mention of insurance or of her citation for failure to exchange insurance information at the accident, and that a belated introduction of the topic would suggest to jurors that plaintiff's counsel had misled them.

The trial court ultimately denied defendant's motion, agreeing that there would be "massive prejudice" to the plaintiff were defendant's motion granted.[11]

In our view, the trial court did not abuse its discretion in denying defendant relief from his waiver of a jury trial.

First, the court proceeded reasonably in its decision-making: It conducted a relatively lengthy hearing on the matter, plainly perceived the difficulties posed by defendant's motion, and explained the bases for its decision. (See *Gonzales v. Nork*, *supra*, 20 Cal.3d at pp. 510-511.) Accordingly, we reject the defendant's threshold contention on appeal that the trial court abused its discretion because it failed to exercise its discretion.

Second, the trial court's denial of defendant's motion was not unreasonable, because his request was untimely -- one of the factors that can be considered. Although on October 3, 2001, defendant protested the court's ruling that plaintiff was insured within the meaning of Civil Code section 3333.4, defendant did not then move for relief from the waiver. Nor did defendant ask for relief from waiver of a jury trial on the following day, when he unsuccessfully sought a statement of decision of the ruling. Instead, defendant's written motion for relief from his waiver of a jury trial was not filed until

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[11] It also denied defendant's motion for a mistrial.

October 9 -- approximately a week after the court's ruling on the Civil Code section 3333.4 issue.[12] By that time, the jury had been selected and opening statements had been made. Moreover, because witnesses were scheduled for that day, the trial court deferred hearing defendant's motion until the following day. By the time that defendant's motion for relief was heard, four witnesses had testified.

Defendant has provided no authority for the proposition that a motion such as his, made midtrial and days after the matter at issue had been tried without a jury, can be considered timely, and we are aware of none. (Cf. *Byram v. Superior Court*, *supra*, 74 Cal.App.3d at p. 653 ["When, as here, the litigant acted promptly to secure a jury trial *and the trial has not yet been held*, and the adverse party made no attempt to oppose the request for relief from waiver of a jury trial, to refuse to allow a jury trial would not be consistent with the often-stated language in the decisions that the general rule is in favor of allowing a jury trial" (italics added)].) Indeed, in the cases upon which defendant chiefly relies, the request for relief from the waiver was made a month before the new trial date (*Boal v. Price Waterhouse & Co.* (1985) 165 Cal.App.3d 806, 809) or six

[12] The record suggests that plaintiff's counsel received notice by telephone the previous day of defendant's intent to file the motion, but the content of that notice is not in the record.

days before the start of trial (*Johnson-Stovall v. Superior Court* (1993) 17 Cal.App.4th 808, 811).

Third, the trial court was entitled to accept plaintiff's argument that she was prejudiced by the untimeliness of defendant's motion for relief. Plaintiff told the trial court that she had been precluded by the timing of defendant's request from incorporating questions concerning her insurance coverage into her opening argument and voir dire. And on appeal, she explains that had defendants "appropriately requested a jury as to [Civil Code] Section 3333.4, [plaintiff] would have conducted voir dire on the following salient topics: (1) attitudes about uninsured motorists; (2) attitudes about those who pay cash for important transactions such as insurance; (3) attitudes about proper record-keeping; (4) willingness to decide an issue based on the testimony of a single witness; (5) ability to keep an open mind and consider explanations for why there was no written proof of insurance; (6) attitudes about court record-keeping and whether it could ever be considered trustworthy; and, perhaps most important, (7) ability to withstand the clear temptation to use the discussion of insurance in the [Civil Code] Section 3333.4 context to consider the availability of other kinds of insurance about which the jury should not speculate . . . ." And plaintiff argues that depending upon the jurors' responses or other trial strategy, she might have contemplated presenting evidence in a different order. The trial court's acceptance of

plaintiff's position that defendant's untimely motion prejudiced her was not unreasonable.

Nonetheless, defendant questions plaintiff's claimed prejudice. He argues: "[I]t would not have been proper to voir dire jurors on this issue (e.g., whether or not they thought it improper for owners to drive uninsured vehicles); and in fact plaintiff's juror questionnaire had been submitted prior to any supposed agreement to submit the insurance issue to the court. Nor did plaintiff explain how and why her opening statement would have been so distinctly different that this concern alone justified denial of relief from waiver."

However, not only does defendant fail to cite any basis for the impropriety of questioning jurors about their opinions concerning an issue that they would have to decide (on which basis we may disregard the contention (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979)), but plaintiff has pointed out a number of relevant areas that do not specifically refer to insurance, which were legitimate questions for the jurors had the financial responsibility issue been submitted to them. As for plaintiff's opening statement, it was obvious how it would have differed had the jury been required to decide another issue that was critical to the amount of damages awarded.

There was no abuse of discretion.[13]

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[13] We also reject defendant's suggestion the trial court abused its discretion by denying defendant's motion for a mistrial.

(CONTINUED.)

III.

The Trial Court Did Not Improperly Rely on the Dismissal of Plaintiff's Citation in Determining that Civil Code Section 3333.4 Did Not Apply

Defendant next contends that "[t]he court erred in ruling that the dismissal of plaintiff's citation . . . conclusively established that her vehicle was insured for purposes of recovering non-economic damages under Civil Code section 3333.4 [subdivision] (a)(2)." He claims that such a finding improperly "give[s] preclusive effect to the ministerial action of a deputy court clerk," conflicts with the plain meaning of Civil Code section 3333.4, and misreads the relevant Vehicle Code provisions.

But the premise of defendant's argument is erroneous: The trial court did not rule that the court clerk's dismissal of plaintiff's citation conclusively established that her vehicle was insured. Instead, in its ruling, the court expressly stated: "The bottom line is that I do believe that [plaintiff] had her own personal insurance in effect at the time of the accident. And that's based on her testimony on the offer of proof. She may not be the best or smartest person when it comes

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Defendant claims that any prejudice to plaintiff "could easily have been cured by impaneling a new jury and starting over." But a mistrial after four witnesses (including defendant) had already testified would have been prejudicial to plaintiff and wasteful of judicial resources. And defendant fails to give this contention a separate heading or develop the argument. Accordingly, we may disregard it. (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19.)

to these kinds of decisions. After all, who pays cash for these kinds of things? She had a valid explanation for doing that. [¶] . . . [¶] The fact is, I believe she did have insurance. That she did pay cash for it. It's borne out by the declaration, and by Ms. Smith's decision that she was entitled to the dismissal based on, or/and this fix-it ticket type dismissal, based on proof that was submitted. . . . [¶] So I do believe she had insurance."

Thus, the court based its conclusion that plaintiff had insurance on several factors: "her testimony on the offer of proof," her declaration submitted in opposition to the motion for summary adjudication, and the testimony of Ms. Smith (nee Stanfill) concerning the proof of insurance sufficient to warrant a dismissal of plaintiff's citation.

Accordingly, it is clear that the trial court did not rely on the traffic court's dismissal of plaintiff's citation to "conclusively prove[] that she was insured for purposes of collecting non-economic damages," as defendant argues.

However, we do note that the trial court's posttrial order denying defendant's motion for a new trial does rely on the court clerk's dismissal of the citation:

After the jury returned its verdict, defendant moved for a new trial. Although his written notice failed to identify the insufficiency of the evidence supporting the trial court's insurance finding as a basis for his motion, defendant twice raised the specter of the insufficiency of the evidence at the

hearing: He asserted (during the course of arguing that he had not intended to waive a jury) that "[a]t that juncture, Your Honor, there is insufficient evidence for her to get to a jury for the simple reason that there was an absence of proof as to the terms of the insurance" and "[plaintiff's] story lack[ed] sufficient substantively [*sic*] to get to a jury."

Regardless of whether defendant's rhetoric constituted an adequate challenge to the sufficiency of the evidence supporting the trial court's finding of plaintiff's financial responsibility, the trial court so interpreted it, and in its order denying defendant's motion for a new trial, it rejected the argument: "The defendants argue that there was insufficient evidence for the court to find that the plaintiff was entitled to noneconomic damages under [Civil Code section] 3333.4 because she testified to the mere existence of her personal insurance coverage on the day of the accident rather than to the extent of that coverage. . . . The plaintiff showed during the court trial that on the date of the accident she had insurance coverage sufficient to comply with the financial responsibility laws of the state, as evidenced by the court's dismissal of further proceedings on the notice to appear for violation of . . . Vehicle Code [section] 16028[, subdivision] (a) issued on the date of the accident. Therefore, she did present evidence that her insurance covered her on the date of the accident to the extent required by the financial responsibility laws and there

was sufficient evidence to find that she was entitled to noneconomic damages under . . . Civil Code [section] 3333.4."

Although defendant now argues that the trial court's reasoning on this point was flawed, he never contends that the trial court erred in denying his motion for a new trial. Consistent with the standard rules of appellate procedure, we limit our consideration to matters briefed on appeal. (*Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 948.)

"In a challenge to a judgment, it is incumbent upon an appellant to present argument and authority on each point made. Arguments not presented will generally not receive consideration." (*County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576, 591; accord, *In re Marriage of Ananeh-Firempong* (1990) 219 Cal.App.3d 272, 278.) Having failed to expressly challenge the trial court's denial of his motion for new trial, defendant's assertion that the trial court gave improper weight to the dismissal of plaintiff's traffic citation avails him nothing.

In sum, the trial court did not give conclusive effect to the dismissal of the citation in its original ruling, *and* defendant fails to challenge the denial of the new trial motion.

And even were we to construe defendant's appeal as a proper challenge to the trial court's denial of his new trial motion, that challenge would necessarily fail because any error in the court's reasoning could not have been prejudicial. (See *Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 969.)

First, as we explained above, the record belies defendant's suggestion that the trial court gave preclusive effect to the dismissal of plaintiff's citation at the time it ruled on the motions in limine. Instead, the dismissal of plaintiff's citation was but one of several factors underlying the trial court's finding that plaintiff had insurance at the time of the accident.[14] Second, the trial court did not suggest in its denial of the new trial motion that it gave *conclusive* effect to the dismissal of the citation; it simply considered it as evidence of insurance coverage. And the testimony of a single witness can constitute substantial evidence. Furthermore, on appeal, we view the evidence in the light most favorable to the prevailing party, giving her the benefit of every reasonable inference and resolving all conflicts in her favor. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *Oregel v. American Isuzu Motors, Inc*. (2001) 90 Cal.App.4th 1094, 1101.) The evidence was sufficient to support the trial court's ruling on Civil Code section 3333.4.

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[14] Further, defendant makes no argument on appeal that the trial court's factual finding that plaintiff had insurance at the time of the accident is not supported by substantial evidence; he only argues the *dismissal* should not be given *conclusive* effect.

IV.

Substantial Evidence Supports the Jury's Determination Concerning Plaintiff's Medical Bills

A person injured by another's tortious conduct "is entitled to recover the reasonable value of medical care and services reasonably required and attributable to the tort." (*Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 640, citing *Melone v. Sierra Railway Co.* (1907) 151 Cal. 113, 115.)

To establish that her medical bills represented the reasonable value of services reasonably required to treat the injuries attributable to the accident, plaintiff submitted the testimony of Dr. Pasquale Montesano, an experienced orthopedic surgeon long engaged locally in practicing, teaching, and writing in his specialty, who treated plaintiff after the accident and who performed four of the five surgeries concerning her neck and spine (two on her neck and two on her lower back).

In addition to testifying about plaintiff's back injuries and his resulting surgeries, Dr. Montesano also reviewed plaintiff's medical records (including those related to her health before the accident), and he reviewed a compilation of the bills (Exhibit 12) for various medical services rendered to plaintiff in the wake of the accident, including bills for surgery, hospitalization, medications, treatment by other physicians, physical therapy, and acupuncture. Based on that review, Dr. Montesano opined that the accident in which plaintiff was involved produces "the kind of dynamics on the body that will in fact . . . produce a cervical spine injury" of

the type suffered by plaintiff and that the April 1996 accident alone caused the injuries to plaintiff's spine that required the treatment reflected in Exhibit 12, not a shoulder strain or tailbone injury suffered the previous March. Although he conceded some aspects of the condition of plaintiff's lower back might have predated the accident, he testified that the condition would not necessarily have caused any of plaintiff's symptoms, absent the accident.

Dr. Montesano further opined that the care and treatments reflected in Exhibit 12 were "[a]bsolutely" necessary for the injuries that she sustained, that the costs of the procedures reflected therein, while substantial, "[were] . . . the reasonable cost[s] in this community that are charged and incurred for . . . that kind of treatment," and that the charges reflected in Exhibit 12 were "reasonable and necessary" for the treatment that plaintiff incurred.

On appeal, defendant raises various challenges to Dr. Montesano's testimony.

First, he contends that Dr. Montesano's testimony fails "to state that all of the treatment [reflected in Exhibit 12] was related to the accident." We disagree: Dr. Montesano's testimony that the April 1996 accident alone caused the injuries to plaintiff's spine that required the treatments reflected in Exhibit 12, that he had performed four of the five surgeries on her neck and spine, and that the care reflected in Exhibit 12 was the type of care "[a]bsolutely" necessary for the injuries

that she sustained in the accident is sufficient to establish that all of the treatment described in Exhibit 12 was "related to the accident."

Second, defendant insists Dr. Montesano's testimony fails to establish that the medical expenses compiled in Exhibit 12 were necessary and reasonable. We disagree. Dr. Montesano's testimony constituted substantial evidence that the medical expenses compiled in Exhibit 12 were necessary and reasonable, by virtue of his testimony concerning his expertise and familiarity with plaintiff's case, his testimony that he had reviewed all of the bills compiled in Exhibit 12, his opinion that the medical treatment reflected in those bills were the type of care "[a]bsolutely" necessary for the injuries plaintiff had sustained in the subject accident, and his opinion that the medical charges were reasonable in amount.[15]

Third, defendant challenges Dr. Montesano's testimony that the acupuncturist's charges in the amount of $8,500 were reasonable.[16] Defendant contends that when asked about the kind

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[15] Having concluded that Dr. Montesano's testimony constituted substantial evidence that the medical expenses that plaintiff sought to recover were necessary, reasonable, and related to the accident, we reject defendant's argument that the trial court erred in denying a new trial on the ground that Dr. Montesano's testimony was insufficient to justify the amount of medical costs awarded.

[16] Although defendant cross-examined Dr. Montesano at trial about the bills for *his* services, he does not contend on appeal that Dr. Montesano's bills were unreasonable.

of acupuncture treatment represented by the bills, Dr. Montesano responded that he did not know the kind and could not interpret the billing codes, but nonetheless testified that the total amount was reasonable. Defendant concludes that such testimony does not constitute substantial evidence.

However, the jury apparently *agreed* with defendant that Dr. Montesano's testimony on the value of the acupuncturist's services was not as well founded as his other opinions: By special verdict, it reduced plaintiff's claimed acupuncture expenses by more than half.

We conclude that substantial evidence supported the jury's verdict on the acupuncturist's charges. First, plaintiff testified that she had had therapy for about a year with an acupuncturist recommended by her physician and that it had helped her back pain.

Second, Dr. Montesano testified that plaintiff's acupuncture treatments "w[ere] for treatment of injuries that were sustained in this accident" and were "reasonable, necessary and related to this automobile accident" -- even though some of the forms prepared by the acupuncturist's office answered "no" to the question whether the patient's condition was related to an auto accident. And as to the acupuncturist's charges, Dr. Montesano testified that he had reviewed the acupuncture bills before, that the charges by plaintiff's acupuncturist "do appear to be reasonable," and that, in fact, for the "multiple, multiple visits to a licensed acupuncturist," the charges "were

a little on the low side" and "more than reasonable." Further, on cross-examination, Dr. Montesano testified that he was "familiar with different [acupuncture] techniques," including stimulation of acupuncture needles with electricity, vibration, and heat, and a technique described by the plaintiff involving the creation of a vacuum over her spine.

Based on this evidence, we reject defendant's contention that Dr. Montesano's testimony was inadequate to support the reasonableness of the acupuncture expenses awarded by the jury. It is true that Dr. Montesano also admitted that he was not an expert in acupuncture, did not know the meaning of each treatment or procedure code listed on the acupuncturist's bills, and thus did not know exactly what procedures were performed by the acupuncturist. But the jury reduced by more than half the charges in its award. Moreover, Dr. Montesano's lack of understanding of the billing codes used on an acupuncturist's billing statements went to the weight of his testimony, not its admissibility. (See *People v. Bassett* (1968) 69 Cal.2d 122, 146, fn. 22 [attacks on the soundness of an expert's opinion on a particular point go to the weight of an expert's opinion].) The evidence was clearly sufficient to support the limited amount awarded.

In sum, substantial evidence supports the jury's determination of plaintiff's medical expenses.

V.

Defendant Waived Any Claim of Error Based on Plaintiff's Argument that the Jury Should Use a "Multiplier"

Defendant contends that the trial court "committed reversible error by permitting the jury to determine damages for pain and suffering by applying a 'multiplier' to an economic damage figure[,] which included the full amount of all medical expenses billed, rather than the amounts actually paid."

This argument, whatever its theoretical merits, is not supported by the record and was waived.

First, plaintiff did not (as defendant argues) urge the jury to apply a multiplier to the medical expenses billed. To the contrary, in the portion of plaintiff's closing argument of which defendant complains, plaintiff argued that the jury might use her *lost wage* damages -- not medical damages -- in the calculation of noneconomic damages.[17] Accordingly, defendant's appellate argument that the jury should not have been urged to

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[17] Plaintiff's counsel argued: "Why do we work? You could look at her numbers, and in terms of her lost income in the past and in the future, and you could use that as a barometer to say, 'well, I think this is what her past quality of life is worth.' 'This is what her future quality of life is worth.' Her past economic damages, $266,000. [¶] Okay, is our quality of life equal to what we earn? I don't think so. I mean, we would be happy to be not working and physically fine, as opposed to disabled and able to work. So that number could be a barometer. You can say I think it's twice. You know, quality of life, three times, five times."

apply "a 'multiplier' to medical expenses" is falsely premised: The jury was not urged to do so.

In any event, when plaintiff *did* suggest that the jury use what could fairly be characterized as a "multiplier" to determine noneconomic damages, defendant made no objection. The failure to object to purportedly improper arguments waives the issue for appeal. (*N.N.V. v. American Assn. of Blood Banks* (1999) 75 Cal.App.4th 1358, 1397-1398; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1247.)

Nor did defendant object when, in a colloquy with counsel, the trial court suggested that the jury might properly use the amounts billed for medical expenses "to accurately calculate the general damages."

Defendant argues that "as far as any failure by [defendant] to object is concerned, the error was made when the ruling was made and the evidence [of medical bills] was admitted, at which time there was no mention of the general damages being related to *past economic loss.*"

To the contrary, defendant's claim, as framed in his opening appellate brief, is that the trial court erred "by permitting the jury to determine damages for pain and suffering

by applying a 'multiplier' to an economic damages figure." The failure to object thereto waived any error.[18]

VI.

The Trial Court Did Not Err in Excluding Evidence of Plaintiff's Workers' Compensation Claim

Plaintiff testified that she was able to work on a part-time or sporadic basis between April 1996 -- when the accident occurred -- and June 1999, at which time she stopped working. Plaintiff testified that in June 1999, her doctor took her off work and had not given her permission to return to work since then.[19] Plaintiff also testified that the *only* reasons that she stopped working in June 1999 were her doctor's orders and the underlying deterioration in her health, in that she was "having difficulty even walking" and "was in a great deal of pain." On cross-examination, plaintiff denied ever having taken a contrary position on that subject.

Out of the presence of the jury, plaintiff's counsel disclosed that sometime during 1999, plaintiff filed a workers'

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[18] As part of his contention that the trial court should not have allowed plaintiff to urge the use of a multiplier, defendant argues that even if it was proper to use medical costs to compute general damages and to do so through a multiplier, "the court used the wrong figure" by using the amount billed. However, since this is part and parcel of defendant's argument that use of the multiplier was error, the claim has been waived by the failure to object.

[19] Dr. Montesano likewise testified that plaintiff had not been able to return to work since June 1999 and that he had not released her to do so.

compensation claim for stress and sought a ruling that defendant be precluded from mentioning the fact of her workers' compensation claim before the jury. Defense counsel responded that he should be permitted to prove that not all of plaintiff's lost wages were attributable to the injuries that she suffered in the accident given that she "quit her job because of 'stress.'"

The trial court refused to allow evidence that plaintiff had filed a workers' compensation claim for stress. It ruled that the fact of the worker's compensation stress claim would violate the "collateral source" rule against allowing evidence of insurance. And exercising its discretion under Evidence Code section 352, the court ruled that the probative value of the fact that plaintiff had filed a claim was "far outweighed by any prejudice" that plaintiff would suffer.

Thereafter, on cross-examination, defense counsel elicited testimony from plaintiff that in June 1999, she had lodged a "complaint" against her supervisor at work by writing a letter to the employer's board to report what she characterized as a "hostile work environment," charging that her supervisor failed to "get a work station for [her], want[ed] [her] to perform tasks that were physically taxing on [her] . . . [and] call[ed] [her] some names." Plaintiff's complaint also accused her employer of "inappropriate use of company funds" that did not directly involve her.

On appeal, defendant contends that the court "erred in applying the collateral source rule to exclude evidence of plaintiff's prior workers' compensation claim alleging that she had quit her job for reasons unrelated to the automobile accident." He argues that "evidence that plaintiff had merely *submitted* a workers' compensation claim, without ever having received any benefits thereunder, is not the sort of harm which any part of the collateral source rule exists to avoid." And he emphasizes "how probative this testimony would have been on the issue of plaintiff's credibility" because plaintiff had persuaded the jury that "every penny lost by not working . . . was caused solely by the accident."

But defendant ignores the court's stated, independent, and alternative ground for excluding the evidence of plaintiff's workers' compensation stress claim -- that Evidence Code section 352 justified excluding the evidence as more prejudicial than probative. If the court properly excluded the evidence under Evidence Code section 352, we need not address defendant's claim that the court erred in applying the collateral source rule.

A trial court has broad discretion in deciding whether to limit or exclude otherwise admissible evidence under Evidence Code section 352, and its exercise of discretion may not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

We see no basis for concluding that the trial court abused its discretion here. Plaintiff's counsel did not suggest, and defendant presented no offer of proof, that plaintiff alleged in her worker's compensation claim that she could not work or left her employment *because of stress*. Plaintiff's counsel merely noted that the claim alleged that plaintiff had stress on the job, not that *she could not work because of stress*. Defendant's failure to make an offer of proof at the time plaintiff sought exclusion of this evidence waives the right to appeal the purportedly erroneous exclusion of the evidence. (Evid. Code, § 354, subd. (a).)

Specifically, evidence Code section 354, subdivision (a), provides: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless . . . [¶] . . . [t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means." (See *Gutierrez v. Cassiar Mining Corp*. (1998) 64 Cal.App.4th 148, 161-162.)

Here, we do not know what the workers' compensation claim would have shown. Thus, the substance of the excluded evidence was never made known to the court.

Nor does the existence of a worker's compensation claim necessarily suggest that the basis of the claim required the employee to leave her employment. Defendant argues that "a workers' comp stress claim . . . , by its very nature, would

have been inconsistent with [plaintiff's] position at trial that *all* of her wage losses and other damages resulted from the accident, and none from her experiences at work." But an employee filing a workers' compensation claim may simply seek medical treatment (such as treatment by a counselor for stress) or medical supplies (such as those that might be provided by physical therapists or chiropractic practitioners). (See Lab. Code, § 3209.5; *Derrick v. Workers' Comp. Appeals Bd.* (1984) 159 Cal.App.3d 451, 452-454; see also 2 Witkin, Summary of Cal. Law, *supra*, Workers' Compensation, §§ 249-255, pp. 820-823.)

Thus, the fact that plaintiff filed a workers' compensation claim for stress would have added only that plaintiff's stress had resulted in the filing of a claim. That fact, without more detail, is not so probative to the issue whether plaintiff left her employment because of her vehicular injuries so as to compel the conclusion that the trial court erred in excluding the evidence as more prejudicial than probative of the extent of her lost earnings. Indeed, its admission could well have contributed to juror confusion or improper speculation. The trial court's decision to exclude it was therefore not an abuse of discretion.[20]

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[20] We decline to consider defendant's contention in a footnote, and without authority, that the trial court also "committed prejudicial error in excluding evidence of plaintiff's receipt of workers' compensation benefits in order to show that she did indeed have a strong motive for never returning to work . . . ." When a point is asserted in passing by appellant's counsel

(CONTINUED.)

DISPOSITION

The judgment is affirmed. Plaintiff shall recover her costs on appeal. (Cal. Rules of Court, rule 27.)

KOLKEY, J.

We concur:

DAVIS, Acting P.J.

NICHOLSON, J.

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without any argument of or authority for the proposition, it is deemed to be without foundation and requires no discussion by the reviewing court. (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647; *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282.)